

Claims, Torts, Civil Rights, and Immunities

Certificate on Risk Management Program

Utah Counties Insurance Pool

Presented by: Gary McKean

August 25, 2004

Introduction

- A. Purpose: Overview
- B. Heart of the topic:
 - 1. Liability
 - 2. Risk Management
- C. Courts and Applicable Law and Rules
 - 1. Federal - civil rights cases, § 1983, constitutional violations
 - 2. State - negligence, torts, state procedures, Governmental Immunity Act
- D. Plaintiff Information Resources
 - 1. Attorneys
 - 2. How-to Books
 - 3. Software
 - 4. Internet
 - a. How-to
 - b. Laws and cases
 - c. Articles
- E. Risk Management and the Wasatch Fault - "when" not "if"
 - 1. Policy
 - 2. Training
 - 3. Supervision/monitoring
 - 4. Records

Claims

- A. Nature
- B. Statutory procedure and requirements
- C. County policy and procedures
- D. Investigate
- E. Gather records

Torts

- A. Overview
- B. Elements of a Tort
 - 1. Duty
 - 2. Breach of duty
 - 3. Cause
 - 4. Injury (Damages)
- C. Negligence
 - 1. Utah statutes
 - 2. *Day v State of Utah*
- D. Vicarious Liability
 - 1. *Ahlstrom v Salt Lake City Corporation*
 - 2. *Faragher v City of Boca Raton*
- D. Utah Statutes on negligence
 - 1. § 78-27-37 Definitions
 - 2. § 78-27-38 Comparative Negligence

3. § 78-27-56.5 Attorney's fees
 4. § 78-27-63(2) Recreational activity
 5. § 63-30-34 Limitation of judgments
- E. Defenses
1. Affirmative defenses
 2. No duty - *Day* case
 3. Immunity

Civil Rights

- A. Litigation
1. State courts
 2. Federal courts
 3. Not mutually exclusive
- B. 42 U.S.C. § 1983

*Every person who, **under color of any statute, ordinance, regulation, custom, or usage**, of any State or Territory, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the **deprivation of any rights**, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.*

- C. Standards
1. Constitutional violation (negligence insufficient)
 2. Clearly established law
 3. Exhaustion of administrative remedies (inmate actions)
 4. Deliberate indifference
 5. Reasonable objectiveness test

- D. Who can be sued
 - 1. Individual
 - a. Acting under color of law
 - b. Individually or in official capacity
 - 2. Governmental entity
- E. Cases
- F. Attorney's Fees

Immunities

- A. Absolute
- B. Qualified Immunity - federal cases
 - 1. Definition
 - 2. Protects against damages claims but not injunctions
 - 3. Applies to individuals not the county
 - 4. 10th Circuit Cases
 - 5. Standards
- C. Governmental Immunity Act (Title 63, Chapter 30) - state cases
 - 1. Provides immunity against claims unless specifically waived
 - 2. Waives immunity as to specified claims
 - 3. Some exceptions to waivers
 - 4. Provides procedure
 - 5. Judgment limitation
 - 6. Defense of employees

Risk Management

A. P.T.S.R.

1. Policy: Develop, adopt, evaluate, update and review
2. Training: Develop program, update, document
3. Supervise: Monitor, document, take actions, evaluate
4. Records: Clear, thorough, pertinent, classified under GRAMA

Note: Records will be discoverable

B. Policies and Procedures

1. Know the policy and procedure
2. Custom and practice: Equivalent of policy
Know and change (by written policy as needed)
3. Process for adoption and modification - make policy official
4. Reasonably related to function
5. Communicate it

C. Observations with litigant's eyes

D. What to do when you receive a claim or are served

Final Thought

Anxious Attorneys Tort Recipe - "It's a good thing."

Anxious Attorney's Tort Recipe

This traditional recipe is especially appealing to plaintiff's attorneys and usually turns out well for them. Some of the ingredients and directions may be changed around or omitted but in the end the blend can yield a distinctive tort. Do not be concerned with facts or discovery.

Basic Tort

1 finding	legal duty to plaintiff
1 breach	duty (comes in various forms and amounts)
1 allegation	cause (must be proximate)
1 claim	injury (may substitute loss)

Blend together in desired amounts. Place into a notice of claim form and file with Clerk for aging.

Allegation Sauce

1 portion	ignored legal advice
2 or more	prior incidents without change in practice
2 or more	observed but uncorrected factors
1 token	training
1 smack	policy (can substitute poor or incomplete policy)
2 or more	incomplete or poor records
½ cup	monitoring-free or low-monitoring supervision
pinch	putting off
pinch	innuendo
1 assertion	public good
1 claim	negligence

Blend prior incidents and uncorrected factors into a concoction of statements.

Mix token training and poor or incomplete policy (if there is no policy, substitute shock and dismay) with the concoction.

Peel the records and add the monitoring; sauté with the putting until malleable; blend with the concoction.

Using separate clauses, heat up the observed but uncorrected factors, monitoring-free or low monitoring supervision until boiling. Fold into the concoction together with claims of negligence and whip into cause of action.

After the Basic Tort has properly aged, place the Basic Tort mixture into a complaint form and cover lavishly with the Allegation Sauce. Decorate with ignored legal advice, innuendo and the assertion of public good.

File and cook at a high temperature, stirring constantly, until all that can be got is gotten.

Yield

The results will vary but usually there is never enough for plaintiffs and always too much for defendants.